MA BOON LAN

v.

UOB KAY HIAN PRIVATE LTD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
LIM YEE LAN JCA
[CIVIL APPEALS NO: Q-02(IM)-2017-2011
& Q-02(IM)-2018-2011]
20 MAY 2013

CIVIL PROCEDURE: *Service - Out of the jurisdiction - Service of notice of writ on company abroad - Principles and application - Whether the word 'may' in O. 11 r. 5(8) Rules of the High Court 1980 to be taken in mandatory sense - Service in accordance with law of country in which service is effected - Whether notice of writ served out of jurisdiction needs to be served personally - Rules of the High Court 1980, O. 11 rr. 5(3) & 6(2) - Companies Act 1988 [Sing], s. 387 - Whether complied*

CIVIL PROCEDURE: *Striking out - Application for - Appeal against dismissal of application to strike out - Whether issues that arose to be determined at trial - Whether application wholly unsustainable*

WORDS & PHRASES: *"may" - Rules of the High Court 1980, O. 11 r. 5(8) - Wording of - Whether mandatory*

Vide encl. 23, the defendant had applied to strike out under O. 12 r. 6 and O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC') the plaintiff's notice of writ and the service out of jurisdiction thereof. Briefly, the facts were that the plaintiff had earlier filed a suit against the defendant for general and aggravated damages, alleging that the defendant had libelled him in two publications, *ie,* the 'Borneo Post' and the 'United Daily News' respectively. However, the defendant's place of business and registered address was in Singapore. The plaintiff obtained the leave of court to issue and serve the writ out of jurisdiction in Singapore. The Judicial Commissioner ('JC') in the said encl. 23, however, held that the plaintiff's purported service out of jurisdiction of the notice and/or the writ of summons on the defendant in Singapore was irregular and not in accordance with the law. The learned JC further ordered that the defendant's application in encl. 23 be dismissed and each party to bear its

A own costs. Aggrieved, the plaintiff then appealed to this court ('the first appeal') against part of the decision whereby the JC had ordered that the service of the plaintiff's writ of summons (encl. 3) and the notice of writ of summons (encl. 13) on the defendant in Singapore be set aside. The defendant was also
B aggrieved by the JC's decision in dismissing their application under encl. 23 and hence, the second appeal ('the second appeal').

Held (allowing plaintiff's appeal; dismissing defendant's appeal)

C **Per Azahar Mohamed JCA delivering the judgment of the court:**

(1) The word 'may' in O. 11 r. 5(8) of the RHC must be taken in its natural sense, that is, permissive sense and not mandatory or obligatory sense. There was no reason for giving
D 'may' a mandatory meaning. In the context of the present case, it merely gave the plaintiff an option to serve should he so desire, the notice of writ of summons to be served out of jurisdiction and the writ of summons together with the statement of claim to the defendant in the mode as stated in
E the provision. (para 11)

(2) Order 11 r. 5(3) of the RHC provides that a notice of writ which is to be served out of the jurisdiction need not be served personally on the person required to be served so long
F as it is served on him in accordance with the law of the country in which service is effected. Thus, the notice of writ of summons to be served out of jurisdiction and the writ of summons together with the statement of claim at the defendant's registered office in Singapore through the plaintiff's
G agent in Singapore was made in compliance with O. 11 r. 5(3), O. 11 r. 6(2) and s. 387 of the Singapore Companies Act 1988. The JC had erred in law and in fact in deciding that the service out of jurisdiction on the defendant in Singapore was defective. (paras 12, 13 & 14)

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(3) As for the defendant's appeal, encl. 23 was found to be wholly unsustainable. In the statement of claim, the plaintiff had pleaded that the publications in the Borneo Post and United Daily News were alleged to have occurred within the
I High Court's jurisdiction. The court was not concerned as to the truth of the allegations made in the statement of claim. Indeed, the questions whether there were in fact any

publications, whether the publications were defamatory of the plaintiff or otherwise, whether the publications were privileged and so on were issues to be determined at trial. (para 15)

Bahasa Malaysia *Translation Of Headnotes*

Melalui lampiran 23, defendan telah memohon di bawah A. 12 k. 6 dan A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan notis writ dan penyerahan di luar bidang kuasa plaintif. Secara ringkas, faktanya adalah bahawa plaintif telah sebelum ini memfailkan satu guaman terhadap defendan untuk ganti rugi am dan tambahan, dengan dakwaan bahawa defendan telah memfitnahnya di dalam dua penerbitan, iaitu, "Borneo Post" dan "United Daily News". Walau bagaimanapun, tempat perniagaan dan alamat berdaftar defendan adalah di Singapura. Plaintif telah memperolehi kebenaran mahkamah untuk mengeluarkan dan menyerahkan writ di luar bidang kuasa di Singapura. Pesuruhjaya Kehakiman ('PK') di dalam lampiran 23 tersebut, walau bagaimanapun, telah memutuskan bahawa penyerahan di luar bidang kuasa notis dan/atau writ saman ke atas defendan di Singapura adalah tidak teratur dan tidak sejajar dengan undang-undang. Yang arif PK membuat perintah lanjut dengan menolak permohonan defendan dalam lampiran 23 dan setiap pihak menanggung kosnya sendiri. Tidak puas hati, plaintif telah memohon ke mahkamah ini ('rayuan pertama') terhadap sebahagian daripada keputusan di mana PK telah membuat perintah untuk penyerahan writ saman plaintif (lampiran 3) dan notis writ saman (lampiran 13) defendan di Singapura diketepikan. Defendan juga tidak puas hati dengan keputusan PK dalam penolakan permohonan mereka di bawah lampiran 23 dan oleh itu, rayuan kedua ini ('rayuan kedua').

Diputuskan (membenarkan rayuan plaintif; menolak rayuan defendan)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Perkataan 'may' di dalam A. 11 k. 5(8) KMT perlu diambil dalam erti semula jadi, iaitu, dari segi permisif dan bukan dari segi mandatori atau wajib. Tiada sebab untuk memberikan 'may' maksud yang mandatori. Dalam konteks kes ini, ia hanya memberi plaintif pilihan untuk menyerah, mengikut keinginannya,

notis writ saman untuk diserah di luar bidang kuasa dan writ saman bersama-sama dengan pernyataan tuntutan kepada defendan dalam cara yang dinyatakan di dalam peruntukan.

(2) Aturan 11 k. 5(3) KMT memperuntukkan bahawa notis writ yang diserah di luar bidang kuasa tidak perlu diserahkan secara kediri ke atas pihak yang terlibat selagi ia diserahkan kepadanya mengikut undang-undang negara di mana serahan itu dilaksanakan. Oleh itu, notis writ saman yang diserahkan di luar bidang kuasa dan writ saman bersama-sama dengan pernyataan tuntutan di pejabat berdaftar defendan di Singapura melalui ejen plaintif di Singapura dilaksanakan mengikut A. 11 k. 5(3), A. 11 k. 6(2) dan s. 387 Akta Syarikat Singapura 1988. PK telah khilaf dari segi undang-undang dan fakta dalam memutuskan bahawa penyerahan di luar bidang kuasa ke atas defendan di Singapura adalah cacat.

(3) Berkenaan rayuan defendan, lampiran 23 tidak dapat dipertahankan. Di dalam pernyataan tuntutan, plaintif telah memplid bahawa penerbitan-penerbitan di dalam Borneo Post dan United Daily News didakwa telah berlaku di dalam bidang kuasa Mahkamah Tinggi. Mahkamah tidak menghiraukan kebenaran-kebenaran dan dakwaan-dakwaan di dalam pernyataan tuntutan. Sesungguhnya, persoalan-persoalan sama ada terdapatnya penerbitan-penerbitan itu, sama ada penerbitan itu memfitnah plaintif atau sebaliknya, sama ada penerbitan-penerbitan adalah diberi keistimewaan dan seterusnya merupakan isu-isu yang perlu diputuskan di perbicaraan.

Case(s) referred to:

Danaharta Managers Sdn Bhd v. Tsang & Ong Stockbrokers Pte Ltd [2004] 2 CLJ 877 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 23(1)(a)
Federal Constitution, art. 128
Rules of the High Court 1980, O. 6 r. 6(1), O. 11 rr. 4, 5(3), (8), 6(2), O. 12 rr. 6, 7, O. 18 r. 19

Companies Act 1988 [Sing], s. 387

For the plaintiff - Louis Achuk; M/s Kadir, Wong, Lin & Co A
For the defendant - Tai Choi Yu; M/s Tai Choi Yu & Co

[Editor's note: For the High Court judgment, please see Ma Boon Lan v. UOB Kay Hian Private Limited [2011] 1 LNS 1630].

Reported by Suhainah Wahiduddin B

JUDGMENT

Azahar Mohamed JCA: C

[1] There are two appeals before us first, Civil Appeal No. Q-02(IM)-2017-2011 (the first appeal). In the first appeal, the appellant is Ma Boon Lan (the plaintiff in the High Court) and the respondent is UOB Kay Hian Private Limited (the defendant in the High Court). And secondly, Civil Appeal No. Q-02(IM)-2018-2011 (the second appeal). In the second appeal, the appellant is UOB Kay Hian Private Limited and the respondent is Ma Boon Lan. We heard both the appeals together and after hearing oral arguments, we reserved judgment. We now give our judgment. D E

[2] For convenience, we will refer to the parties in this judgment to the title assigned to them in the court below.

[3] Both these appeals arise from the decision of the learned Judicial Commissioner (JC) given in the High Court at Miri on 16 June 2011 in relation to the defendant's summons in chambers dated 22 November 2010 (encl. 23). F

[4] By encl. 23, the defendant had applied to strike out under O. 12 rr. 6 and 7 and O. 18 r. 19 of the Rules of the High Court 1980 (the RHC) the plaintiff's writ and/or the notice of writ and the service out of jurisdiction thereof. In respect of encl. 23, the learned JC held that the plaintiff's purported service out of jurisdiction of the notice and/or the writ of summons on the defendant in Singapore was irregular and/or not in accordance with the law. The learned JC further ordered that the defendant's application in encl. 23 be dismissed and each party to bear its own costs. G H

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A **[5]** Aggrieved by that decision, the plaintiff then appealed to this court (the first appeal) against part of the decision whereby the learned JC ordered that the service of the writ of summons (encl. 3) and the notice of writ of summons to be served out of jurisdiction (encl. 13) on the defendant in Singapore be set aside.
B The defendant is also aggrieved by that decision in that the learned JC had dismissed their encl. 23 with each party to bear it own costs; hence the second appeal.

[6] We think it is useful to state briefly the factual background
C and the sequence of events leading to the present appeals. In a previous action, on 8 August 2003 the defendant had obtained judgment against the plaintiff for a sum of S$21,993.41 with interest and costs. The defendant had initiated several execution proceedings against the plaintiff arising from this judgment.
D The defendant filed a bankruptcy notice *vide* Bankruptcy Proceedings No. 29-333-2008. The plaintiff then applied to strike out the bankruptcy notice. Pending the hearing of the plaintiff's application to strike out the bankruptcy notice, on 16 January 2009, the defendant as the creditor in Bankruptcy Proceedings
E No. 29-333-2008 filed the creditor's petition against the plaintiff. On 14 July 2009, the Senior Assistant Registrar (the SAR) had allowed the plaintiff's application to strike out the bankruptcy notice. After that, the defendant had filed an appeal to the judge in chambers against the decision of the SAR in striking out the
F said bankruptcy notice. Even though the bankruptcy notice had been struck out and despite the defendant's appeal to judge was still pending, the defendant had on 6 July 2009 proceeded to serve the creditor's petition by substituted service *vide* two publications in the "Borneo Post" and the "United Daily News"
G respectively.

[7] The plaintiff complained that the publications were wrongful and had libeled him. So therefore, the plaintiff filed this suit herein against the defendant for general and aggravated damages.
H However, the defendant's place of business and registered address was in Singapore. In that case, the plaintiff had applied for and obtained the leave of the court to issue the writ out of jurisdiction and also to serve the writ out of jurisdiction in Singapore. Then, the defendant filed encl. 23, which is the subject matter of the
I appeals herein.

The First Appeal

[8] With regard to the first appeal, it is important to note that the true sealed copies of the notice of writ of summons to be served out of jurisdiction and the writ of summons together with the statement of claim were personally served on the defendant in Singapore by one Mohd Yunos bin Aim, a process server of Hilborne & Co. Advocates and Solicitors, of Singapore. In his affidavit of service, the process server affirmed as follows:

> 1. That I did on the 3 December 2010 at 10.23 am personally served the abovenamed defendant at 8 Anthony Road # 01 Singapore 229957 with the true sealed copies of the notice of writ summons to be served out of jurisdiction dated the 22 September, 2010 and the writ of summons dated the 17 June, 2010 together with the statement of claim thereof dated the 16 June, 2010 which appeared to me to have been regularly issued out of the High Court at Miri Sarawak against the abovenamed defendant at the suit of the abovenamed plaintiff. A copy each of the proof copy of notice of writ of summons to be served out of jurisdiction dated the 22 September, 2010 and the writ of summons dated the 17 June, 2010 are annexed hereto.
>
> 2. That when I reached the aforesaid address of the defendant, I met with a lady whose name was Ann who admitted to me that she is a staff of the defendant and is authorized to receive documents. The said person had signed and placed the official rubber stamp of the plaintiff on the proof copies of the said notice of writ of summons to be served out of jurisdiction dated the 22 September, 2010 and the writ of summons dated the 17 June, 2010 to confirm the receipt of the said documents and she had accepted the service copies of the said notice of writ of summons to be served out of jurisdiction dated the 22 September, 2010 and the writ of summons dated the 17 June, 2010 on behalf of the defendant.

[9] In his judgment, the learned JC held that the plaintiff's purported service out of jurisdiction is irregular and defective. In particular, the relevant passage from the judgment of the learned JC states:

> Order 11 r. 5(8) provides that where the defendant is in Singapore or Brunei, the notice of a writ may be sent by post or otherwise by the registrar to the magistrate, registrar, or other appropriate officer of any court exercising civil jurisdiction in the area in which the person to be served is said to be or to be

A carrying on business for service and with an affidavit of service, it shall be deemed to have been duly served. It means the notice of the writ is to be sent by the DR or SAR in Miri to the magistrate or registrar in Singapore for service upon the defendant in this case. From the affidavit of service, this was not complied with. The notice and the writ were served by Mohd Yunos Aim, a process server of Hilborne & Co. Advocates and Solicitors, of Singapore. The service of the writ out of jurisdiction being not in compliance with the RHC was defective and should be set aside.

[10] With respect, we are unable to agree with the views of the C learned JC on this issue. Order 11 r. 5(8) of the RHC states:

Where the defendant is in Singapore or Brunei, the notice of a writ **may** be sent by post or otherwise by the registrar to the magistrate, registrar, or other appropriate officer of any court exercising civil jurisdiction in the area in which the person to be D served is said to be or to be carrying on business for service on the defendant, and if it is returned with an indorsement of service and with an affidavit of such service, it **shall** be deemed to have been duly served. (emphasis added)

E **[11]** It is to be noted that the words 'may' and 'shall' occur in the same provision. The two words are used in contradistinction to each other. Since the words occur in the same provision, they should be given their natural meaning. For this reason, in our judgment the word 'may' where it appears in O. 11 r. 5(8) of the F RHC must be taken in its natural sense, that is, permissive sense and not mandatory or obligatory sense. There is no valid reason for giving 'may' a mandatory meaning as argued by learned counsel for the defendant. In our view, in the context of the present case, it merely gives the plaintiff an option to serve should he so desire, G the notice of writ of summons to be served out of jurisdiction and the writ of summons together with the statement of claim to the defendant in the mode as stated in the provision.

[12] This then brings into focus the following question: whether the plaintiff had complied with the RHC in effecting service out H of jurisdiction on the defendant. In the first place, it is not disputed that the plaintiff had obtained the necessary leave from the court on 17 June 2010 for the issuance of a writ notice to be served out of the jurisdiction on the defendant pursuant to O. 6 r. 6(1) of the RHC. Next, on 27 August 2010 the plaintiff I obtained leave from the court an order for service out of

jurisdiction pursuant to O. 11 r. 4. Now, the provision relating to the service of a notice of writ outside jurisdiction is O. 11 r. 5(3) of the RHC which provides that a notice of writ which is to be served out of the jurisdiction need not be served personally on the person required to be served so long as it is served on him in accordance with the law of the country in which service is effected. The other relevant provision is O. 11 r. 6(2) of the RHC 1980 which reads:

> Where in accordance with these rules notice of a writ is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the high court, the notice may be served:
>
> (a) through the judicial authorities of that country; or
>
> (b) except where service through a consular authority or by the plaintiff or his agent is prohibited by the law of the country:
>
> (i) through a Malaysian Consular authority in that country; or
>
> (ii) by the plaintiff or his agent.

[13] Learned counsel for the plaintiff brought to our attention the provision of s. 387 of the Singapore Companies Act which provides that a document may be served on a company by leaving it at or sending it by registered post to the registered office of the company. As we have mentioned earlier, the plaintiff had filed an affidavit of service of one Mohd Yunos Aim, a process server of Hilborne & Co. Advocates and Solicitors, where it was averred that true sealed copies of the notice of writ of summons to be served out of jurisdiction and the writ of summons together with the statement of claim were served on the defendant by leaving a copy of the same at the defendant's registered address in Singapore. It is important to note that the defendant never made any denial in any of their affidavits that the said notice and writ of summons together with the statement of claim had been duly served on them. It is for these reasons that we come to the conclusion that the service of the notice of writ of summons to be served out of jurisdiction and the writ of summons together with the statement of claim writ of summons at the defendant's registered office in Singapore on 3 Disember 2010 through the

plaintiff's agent in Singapore was made in compliance with O. 11 r. 5(3), O. 11 r. 6(2) and s. 387 of the Singapore Companies Act. In the case of *Danaharta Managers Sdn Bhd v. Tsang & Ong Stockbrokers Pte Ltd* [2004] 2 CLJ 877; [2005] 2 MLJ 664, the plaintiff had issued a writ notice (encl. 5) to be served out of jurisdiction on the defendant. The defendant's place of business and registered address was in Singapore. The plaintiff then filed an affidavit of service exhibiting the affidavit of service of one Chew Chin Heng ('Chew'), a process server in Singapore. Chew averred that encl. 5 was served by leaving a copy of the same at the defendant's registered address. The defendant applied to set aside encl. 5 on the ground that the service of encl. 5 on them was defective under the laws of Singapore. The defendant claimed they were served by a Malay man and not Chew, as maintained by the plaintiff. As there was no due and proper service of encl. 5 in accordance with O. 11 of the RHC, the defendant maintained that the judicial power of the court should not and could not be invoked in Singapore. The SAR dismissed their application to set aside the service of encl. 5. The defendant appealed. In dismissing the defendant's appeal, Vincent J (as he then was) said, and we respectfully agree with him, as follows:

> It is noteworthy that the defendant did not deny that encl. 5 was served on them ('left at the registered office' in the words of their own counsel) at their registered address at No. 80 Robinson Road #02-00 Singapore. The notice of writ being so served, I would hold that as the plaintiff had complied with s. 387 of Singapore Companies Act and the plaintiff had in turn also complied with the stipulation in our O. 11 r. 5(3) that such notice has to be served 'in accordance with the law of the country in which service is effected'.

[14] Hence, in our view, the learned JC has erred in law and in fact in deciding that the service out of jurisdiction on the defendant in Singapore was defective. Accordingly, we allowed the plaintiff's appeal with costs of RM10,000 in his favour. The deposit is to be refunded to the plaintiff.

The Second Appeal

[15] We turn next to the defendant's appeal. As we have said earlier, this is an appeal by the defendant against the decision of the learned JC in dismissing the defendant's application in encl. 23 with each party to bear it own costs. It is pertinent to note that the grounds of the application are that (a) the court has no

jurisdiction to hear or to entertain the writ; (b) that the plaintiff has no cause of action against the defendant arising within the local jurisdiction of the court; (c) that the defendant resides outside the local jurisdiction of the court; (d) it is an abuse of the process of the court: and (e) that it is scandalous, frivolous and vexatious. In our view, encl. 23 is wholly unsustainable. The Miri High Court may exercise jurisdiction over a non-resident defendant by virtue of s. 23(1)(a) of the Courts of Judicature Act 1964 which provides that subject to the limitations contained in art. 128 of the Constitution, the high court shall have jurisdiction to try all civil proceedings where the cause of action arose. In the statement of claim, the plaintiff has pleaded that the publications of the libel in the Borneo Post and United Daily News, were alleged to have occurred within the high court's jurisdiction. As stated by the learned JC in his judgment, at this point in time, the court is not concerned as to the truths of the allegations made in the statement of claim. Indeed, the questions whether there were in fact any publications, whether the publications were defamatory of the plaintiff or otherwise, whether the publications were privileged and so on are issues to be determined at the trial. In the premise, we dismissed the defendant's appeal with costs of RM10,000 in favour of the plaintiff. The deposit to the plaintiff to account of fixed costs.